47. Regarding the alleged advantage of wireline-affiliated cellular carriers over their competitors, BAMMC asserts that there is no wireline advantage in Arizona.[126] According to BAMMC, RSAs 1 and 2 have two operating carriers, although only one of those carriers offers local service. In four out of the six RSAs, the non-wireline carrier was certificated first. At any rate, the carrier states, the B Block provider's affiliation with a wireline carrier is a nationwide phenomenon.[127] Megdal contends on behalf of BAMMC that continued rate regulation of wholesale cellular services in Arizona is not warranted because market forces will discipline the pricing behavior of both wireline and non-wireline cellular providers.[128] US West New Vector asserts that in every cellular service area in Arizona, the non-wireline carrier has coverage generally equal to and in some cases greater than the wireline carrier. Moreover, US West New Vector argues, annual reports submitted to the ACC document that non-wireline carriers enjoy a sizable market presence in each Arizona cellular serving area.[129]

48. With respect to the ACC's allegations regarding barriers to entry and favoritism of affiliated retailers, Megdal asserts that because Commission rules prohibit discrimination against resellers, discontinuing regulation would not leave resellers unprotected from unjust and unreasonable rates.[130] Besen contends on behalf of GTE that, with rapid technological innovation, there may be gains from aggressive pricing. Newcomers to an industry have strong incentives to compete aggressively to attract market shares from existing firms, Besen states. Aggressive pricing can be expected from PCS entrants as they seek to increase their shares of the mobile services market.[131] Besen also states that CMRS is emerging as a highly dynamic and competitive marketplace, as evidenced by the decline in costs of owning and using cellular phones and the increase in numbers of subscribers.[132]

49. The carriers address individually the state's specific allegations regarding anticompetitive and discriminatory activity. Regarding the roaming tariff provision that allegedly preferred the affiliated retailer over non-affiliates, BAMMC contends that the state provides no proof that the provision was preferential and that the tariff was, at any rate,

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[126] BAMMC Opposition App. A, paras. 23-24.

[127] *Id.*

[128] BAMMC Opposition at 3 n.3 & App. A.

[129] US West NewVector Opposition at 7.

[130] BAMMC Opposition App. A.

[131] GTE Comments App. at 11.

[132] GTE Comments App. at 23.

revised.[133] As for the allegation concerning "calling party pays" service, commenting carriers assert that the lack of notice of potential charges could be remedied through advance notification to wireline customers, and that the issue was addressed years ago between cellular carriers and the wireline telephone company -- companies that the ACC will continue to regulate regardless of the outcome of the instant petition.[134] Finally, addressing resale block sizing, BAMMC contends that the establishment of large minimum resale block sizes was not intended by carriers to disadvantage resale and is, at any rate, irrelevant to consumer prices.[135]

50. The cellular carriers also argue generally that CMRS competition in Arizona is robust and that the ACC has failed to demonstrate any need for rate regulation. For example, US West NV, BAMMC, and CTIA assert generally that the ACC provides no evidence showing that market conditions fail to protect Arizona cellular subscribers from unjust or unreasonable prices.[136] Mohave similarly contends that Arizona fails to present evidence of lack of competition,[137] and Century notes that the Petition itself in fact refers to the increasingly competitive telecommunications market in Arizona.[138] CTIA asserts that state regulation is unnecessary in view of competitive forces in the marketplace.[139]

51. The carriers argue that Arizona rate levels are competitive. CTIA claims that cellular rates in states that regulate are 5 to 15 percent higher than in nonregulating states. It contends that regulation, not lack of competition, may explain higher rates.[140] CTIA also asserts that economic analysis leads to the conclusion that in large, regulated MSAs, prices

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[133] Bell Atlantic Metro Mobile states that it did not try to prefer its affiliates on roaming rates. It asserts that it adopted the selling party's tariffs, always agreed to enter reciprocal agreements with non-affiliates, and eventually changed its tariff voluntarily, to emphasize its intent to offer reciprocal roaming arrangements to all carriers. BAMMC Opposition at 25, 27. Mohave states that the Commission could enforce reciprocity of roaming requirements in the future. Mohave Opposition at 19. We are examining our intrastate enforcement authority in our proceeding in GN Docket No. 93-252.

[134] *See* BAMMC Opposition at 24; US West NewVector Comments at 16.

[135] BAMMC Opposition at 26.

[136] US West NewVector Opposition at 14 n.18; BAMMC Opposition at 24; CTIA Opposition at 2.

[137] Mohave Opposition at 1-11.

[138] Century Cellunet Comments at 4-5.

[139] CTIA Opposition at 10-11 & Hausman Affidavit at 3.

[140] *Id.*

are higher, penetration is lower, and demand levels are lower.[141] At any rate, Arizona cellular carriers assert that intrastate cellular rates are declining. BAMMC states that over the past year it both increased its discounts and dropped the tariffed maximum rates against which those discounts apply.[142] Besen asserts on behalf of GTE that, between December 1992 and December 1993, the number of cellular subscribers increased almost 50 percent.[143] Also, Besen contends, customers have enjoyed a steady decline in the costs of owning and using cellular phones.[144] The cost of owning a cellular phone in 1991 was only 44 percent of its cost in 1983, Besen asserts. He states that this general pattern of declining real prices also holds for cellular systems owned or controlled by GTE.[145] Mohave asserts that Arizona cellular rates are below national average rates.[146] The national average charge is 39 cents per peak minute, for example, but Mohave's rate is 33 cents per peak minute.[147] US West New Vector asserts that the state has presented no evidence that market conditions fail to protect Arizona cellular subscribers from unjust or unreasonable prices.[148]

52. Commenters generally assert that the cellular industry is competitive whether considered in a vacuum or together with other current and future mobile telecommunications services. BAMMC and other cellular interests contend that the ACC fails to note the increasing development of competitive wireless services in Arizona.[149] BAMMC identifies, for example, 46 paging and 78 SMR service providers in Arizona.[150] Mohave notes that it currently competes with 12 unregulated SMR systems, the A Block cellular licensee, and three neighboring cellular carriers whose service areas extend into Mohave's service area and notes that PCS entry is impending.[151] CTIA asserts that CMRS providers competing with

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[141] *Id.*, *citing* Affidavit of Besen, Larner, Murdock (Charles River Associates), ET Docket No. 90-314 (1993).

[142] *Id.*

[143] GTE Comments App. at 6.

[144] *Id.*

[145] *Id.* at 7.

[146] Mohave Opposition at ii, 7, 17, App. 1 (French Affidavit).

[147] Mohave Opposition at 17.

[148] US West NewVector Opposition at 14 n.18.

[149] BAMMC Opposition at 21.

[150] BAMMC Opposition App. B.

[151] Mohave Opposition at ii, 7, 17. Mohave does not mention whether the SMR systems support wide area operations.

cellular include providers of SMR, wide area SMR, PCS, wireless cable, radio, mobile satellite, BETRS, wireless facsimile, and broadband video services.[152] Century similarly alleges that Arizona's cursory analysis of mobile services competition ignores other services with which cellular increasingly competes, such as SMR, wide area SMR, conventional 2-way radio and PCS.[153] The Rural Cellular Association asserts that cellular licensees are or will be subject to competition from cellular resellers and from providers of SMR services and PCS.[154] NCRA, on the other hand, draws a distinction between current service providers and future competitors. It asserts that the states correctly believe that until effective competition arrives, perhaps in the form of PCS and wide area SMR, continued rate regulation is necessary to restrain the dominating market power of cellular duopolists.[155]

53. CTIA cites a Charles River Associates study finding that wide area SMR and certain PCS applications can be deemed competitive substitutes for cellular.[156] GTE asserts that the ACC erred in not including PCS in its definition of the relevant market. GTE states that PCS will expand competition, which will lead to more options and lower rates for consumers.[157] GTE contends that PCS operators may offer either traditional cellular telephony or newer, value-added services.[158] According to GTE, the CMRS marketplace supports substantial supply-side substitutability, so that all mobile telecommunications licensees can provide the same range of services, and therefore all should be considered in the same antitrust market.[159]

54. GTE notes that the advent of PCS will increase the capacity of the industry by adding 120 MHz of spectrum. Thus, GTE asserts, prices should decline whether or not the incumbent firms are behaving competitively.[160] CTIA contends that the new competition from

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[152] CTIA Opposition at 15-16.

[153] Century Cellunet Comments at 4.

[154] Rural Cellular Association Reply at 3 & n.2. No commenters describe the extent of any cellular resale activity in Arizona.

[155] NCRA Comments at 2-3.

[156] CTIA Opposition at 17.

[157] GTE Comments at 15-17.

[158] *Id.* at 3.

[159] GTE Comments App. at 14 (Besen paper).

[160] *Id.* at 13.

wide area SMR and PCS will assure cost-based prices for CMRS service.[161] CTIA asserts that in a 1994 court affidavit (not attached), economist Jerry Hausman found that since PCS began operating in the United Kingdom in 1993, prices have dropped by 20 to 33 percent.[162] The current inter-industry churn rate, according to CTIA, is 16 percent, which buttresses the carriers' claims that the industry is competitive.[163] GTE asserts that the cellular industry already occupies a competitive marketplace and industry concentration will decrease greatly with the advent of the use of PCS and wide area SMR technologies.[164] GTE asserts that we are about to enter an era in which the number of firms supplying mobile telecommunications service will more than double, effective industry capacity will increase by more than fourfold, measured industry concentration will decline by more than half and the share of the effective capacity of the industry licensed to each of the two current cellular providers will decline by more than two thirds.[165]

55. In contrast to the cellular carriers, cellular service resellers contend that cellular licensees have market power and exercise it. NCRA notes that the Department of Justice, after conducting extensive investigations into the cellular industry, concluded that cellular exchange markets are not competitive, cellular duopolists have substantial market power and cellular carriers exercise bottleneck control over their licensed facilities.[166] NCRA asserts that the state Petitions are motivated by states' desire to protect consumers from deleterious conditions whose existence was acknowledged by this Commission when it classified cellular carriers as dominant common carriers during the 1980s and reaffirmed that classification last year.[167] NCRA contends that the FCC should grant the Petitions in order to allow the states to maintain their existing regulatory authority as well as to initiate monitoring proceedings.[168]

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[161] CTIA Reply at 5.

[162] CTIA Opposition at 19 n.42.

[163] *Id.* at 12-13, 20. CTIA explains that "churn" rates reflect customer switching, among cellular providers in the case of "intra-industry" churn, or to other telecommunications services in the case of "inter-industry" churn.

[164] GTE Comments App. at 1 (Besen paper).

[165] GTE Comments App. at 16-19.

[166] NCRA Comments at 3.

[167] NCRA Comments at 5.

[168] NCRA Comments at 6.

(2) Discussion

56. Section 332(c)(3) provides that a state petition shall be granted if it "demonstrate[s]" that market conditions for the service at issue fail to protect subscribers adequately from unjust, unreasonable, or unreasonably discriminatory rates.[169] On this record we conclude that Arizona has not made such a demonstration and, accordingly, we deny its Petition.

57. The basis for this conclusion is straightforward. First, unrebutted evidence shows that cellular rates in Arizona are declining. Second, the ACC Petition does not address the direct and fundamental changes to the duopoly cellular market structure that are being realized by PCS and other services, such as wide area SMR. Third, the ACC presents no evidence of systematically collusive or other anticompetitive practices concerning the provision of any CMRS. Fourth, the ACC does not present evidence showing widespread consumer dissatisfaction with CMRS providers in Arizona, or discuss what specific rate regulations are needed to address whatever level of dissatisfaction may exist. Fifth, the ACC fails to present any analysis regarding the critical issue of investment by cellular licensees (or by any other CMRS providers).[170]

58. Another shortcoming of the ACC's Petition is that it views any evidence of market imperfection as proof of a need for continued rate regulation, while all countervailing evidence is attributed to its regulatory oversight. Even assuming such an argument is reasonable in theory, the ACC has not established that the scrutiny it presently exercises over cellular rates can or does account for the absence of evidence of unjust, unreasonable, or unreasonably discriminatory cellular rates in Arizona. On this record, we cannot conclude that the ACC systematically prescribes cellular rate levels, even maximum rates, or requires conformance with any particular formula for developing rates. Although the state constitution appears to grant the ACC authority to take such actions, and rates apparently are reviewed by the ACC prior to taking effect, the rates appear to be carrier-initiated, and there is little evidence that the ACC routinely alters them as a result of the review process. Given this light-handed exercise of available existing authority, we are not persuaded by Arizona's implicit argument that rates would fall outside the "zone of reasonableness" absent continuation of rate regulation by the ACC.

59. The evidence cited by the ACC as proof that market conditions are inadequate and that continued rate regulation authority is needed to ensure just and reasonable CMRS rates is not persuasive. The first example provided by the ACC, involving a situation in which it ordered changes to the structure of a cellular tariff upon determining that the tariff

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[169] *See* 47 U.S.C. § 332(c)(3).

[170] An important indicator of market failure, in our view, would be evidence that cellular firms are withholding investment in facilities as a means of restricting output and thus boosting price. No such demonstration exists on this record.

as initially proposed unreasonably restricted resale, is not described in detail.[171] However, even assuming the ACC acted in that situation to address a potential problem with a tariff provision, one instance does not establish a pattern of anticompetitive conduct or failed market conditions in Arizona's cellular industry.[172] The second example involved a situation in which the ACC intervened in a matter concerning "calling party pays" customer billing.[173] Under the Communications Act, however, billing practices are considered "other terms and conditions" of CMRS offerings, not rates, and the ACC retains authority to regulate such practices. Regulatory activity concerning such practices is not justification for continued rate regulation authority.

60. The cellular carriers provide plausible rebuttals to other specific actions Arizona asserts represent anticompetitive activity,[174] and we cannot conclude that these isolated incidents constitute a pattern of anticompetitive practices that might warrant continued state rate regulation. Indeed, the ACC does not buttress its allegations in this regard with affidavits of persons with knowledge of the incidents it describes,[175] nor does it attach its decision rejecting the roaming tariff provision, or other evidence that might lend evidentiary value to its allegations or show actual anticompetitive intent on the part of the carriers. For these reasons and the reasons stated above, we deny Arizona's Petition.

c. Cellular as a Replacement for Landline Telephone Exchange Service

61. Section 332(c)(3)(A) of the Communications Act provides that states may retain rate regulation authority by making one of two alternative demonstrations. As discussed above, the first is that CMRS market conditions fail to protect subscribers adequately from unjust, unreasonable, or unreasonably discriminatory rates. The second is that "such market conditions exist *and* such service is a replacement for landline telephone exchange service for a substantial portion of the telephone land line exchange service" within a State.[176] Arizona argues that CMRS should be regarded as an essential service, replacing landline service,

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[171] *See* Arizona Petition at 13.

[172] Moreover, unreasonable restrictions on the resale of cellular service violate this Commission's cellular resale policies. *See* 47 C.F.R. § 22.901(e). Thus, our complaint procedures were (and are) available to address any such concerns. *See Cellular Communications Systems*, 86 FCC 2d at 510-11; *Cellular Resale Order*, 7 FCC Rcd at 4006; Continental Mobile Tel. Co. v. Chicago SMSA Ltd. Partnership, 9 FCC Rcd at 1583-84 (1994).

[173] *See* Arizona Petition at 14.

[174] *See* BAMMC Opposition at 9, 24, 25; US West NewVector Comments at 16.

[175] *See CMRS Second Report and Order*, 9 FCC Rcd at 1505 (requiring that such allegations be supported by affidavit of a person with knowledge).

[176] 47 U.S.C. § 332(c)(3)(A)(ii) (emphasis supplied).

from two perspectives: (1) as a substitute for traditional, basic landline telephone service; and (2) as a connecting link to the landline network for the purpose of mobile communications.[177] Thus, although Arizona does not assert that its Petition is filed pursuant to the second, alternative prong of Section 332(c)(3)(A), as a courtesy to the ACC we will consider its filing in accordance with that statutory subsection.

(1) Comments

62. The ACC notes that six of the eight cellular service markets in Arizona are RSAs. It asserts that many rural households have gone without telephone service due to the costs of extending cable facilities, and states that cellular has provided a substitute for basic telephone service in those areas.[178] Arizona therefore contends that it has a compelling public interest in ensuring that cellular mobile radio services are provided at reasonable rates, and under reasonable terms and conditions.[179] Particularly in rural areas, it believes, these objectives cannot be achieved without regulation.[180]

63. Second, discussing the role of cellular in providing connections to the landline network, the ACC states that cellular technology has made commonplace the ability of travelers to connect to landlines, and that many aspects of commerce, safety and personal communications therefore now depend on access to the cellular network at reasonable prices and under reasonable terms and conditions.[181] Arizona asserts that the reasonableness of these aspects of interconnection cannot be guaranteed without regulation.[182]

64. Commenters generally assert that Arizona has failed to meet its burden with regard to the demonstration required under Section 332(c)(3)(A)(ii). For example, Bell Atlantic and Mohave state that the ACC has not offered evidence or attempted to show that cellular service has ever replaced wireline service in any part of the State, much less for the requisite "substantial portion" of the state's residents.[183] In the RSA that it serves, Mohave asserts, no rural customers are served at home by a cellular system rather than the landline

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[177] Arizona Petition at 19.

[178] *Id.* at 19-20.

[179] *Id.* at 20.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] BAMMC Opposition at 20; Mohave Comments at 5, 16, 17. BAMMC also contends that it would be difficult for carriers to identify scattered rural customers or charge them prices at variance from other customers. BAMMC Opposition at 19, App. A para. 21.

network.[184] BAMMC argues that Arizona is not the only state that may have low wireline penetration levels. BAMMC and US West NewVector note that 94.1 percent of the population in Arizona has telephones, as compared to 93.9 percent of the population nationwide.[185] Bell Atlantic asserts that if cellular is the only choice in some RSAs, the ACC should have explained how it would apply regulation there and determine when it is no longer necessary. It contends that the ACC should not seek to subject the entire cellular industry in Arizona to regulation if it is warranted only in portions of the state.[186]

(2) Discussion

65. Section 332(c)(3)(A)(ii) provides a two-part test for states seeking to continue CMRS rate regulation. Under the first part, a state must demonstrate that the "market conditions" delineated in Section 332(c)(3)(A)(i) exist (*i.e.*, market conditions fail to protect consumers adequately against unjust, unreasonable, or unreasonably discriminatory rates). Under the second part, a state must demonstrate that CMRS is a replacement for landline telephone exchange service in a substantial portion of that state. In the *CMRS Second Report and Order* we concluded that the plain language of the statute requires a state to satisfy both parts of the test in order to secure CMRS rate regulation authority.[187] The Pennsylvania Public Utility Commission ("Pennsylvania PUC") has sought reconsideration of that determination, based principally on an argument that it renders Section 332(c)(3)(A)(ii) superfluous.[188] We address the Pennsylvania PUC's request here in order to provide guidance to all states that might seek CMRS rate authority under Section 332(c)(3)(A)(ii), and to resolve Arizona's pending Petition. For the reasons discussed in the following paragraph, we hereby grant the Pennsylvania PUC's reconsideration petition with respect to this issue.

66. We agree with the Pennsylvania PUC that a literal reading of Section 332(c)(3)(A)(ii) would make it superfluous because any state that could establish the

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[184] Mohave Comments at 5, 8. Mohave notes that some of the customers in this RSA, Arizona 1, are served by BETRS systems rather than the landline network, but the BETRS is not a commercial mobile radio service, and thus does not meet the statutory test. *Id., citing CMRS Second Report and Order*, 9 FCC Rcd at 1425.

[185] BAMMC Opposition at 18-19; US West NewVector Opposition at 9. BAMMC also states that over 80 percent of the State's inhabitants reside in the two MSAs. BAMMC Opposition App. A (Megdal Affidavit). US West NewVector notes that landline penetration has grown, and attributes this growth at least in part to the rates of wireline service, which are still low in comparison to cellular rates. US West NewVector Opposition at 9.

[186] BAMMC App. A (Megdal Affidavit).

[187] *CMRS Second Report and Order*, 9 FCC Rcd at 1505.

[188] *See* Petition for Reconsideration of the Pennsylvania Public Utility Commission, CC Docket No. 93-252, filed May 19, 1994.

existence of failed market conditions would be entitled to grant of its petition under Section 332(c)(3)(A)(i). Since such a reading yields an absurd result, we reject it. That determination, however, does not require us to write out of the statute the language in Section 332(c)(3)(A)(ii) requiring a demonstration that market conditions fail to protect subscribers adequately against unjust, unreasonable, and unreasonably discriminatory rates. Rather, we conclude that by requiring a demonstration of "such market conditions" *and* a showing that CMRS is a replacement for landline telephone exchange service, Congress merely intended to remove the presumption embodied in Section 332(c)(3)(A)(i) that extant market forces are to be preferred over regulation as a means of ensuring just, reasonable, and non-discriminatory CMRS rates. Put another way, where CMRS is the only available exchange telephone service, we construe Section 332(c)(3)(A)(ii) to mean that Congress' interest in promoting universal telephone service outweighs its interest in permitting the market for CMRS to develop in the first instance unfettered by regulation.[189] As a practical matter, all this means is that concerns about anticompetitive conditions in the market for CMRS will be given greater weight where a state can show that such service is the sole means of obtaining telephone exchange service in a substantial portion of a state.

67. Arizona has not made an adequate demonstration under this standard. The ACC has failed to adduce evidence that identifies either: (1) the number of individuals in that State for whom CMRS is the only available telephone exchange service; or (2) whether CMRS service is available to such consumers at just, reasonable and non-discriminatory rates. Indeed, the record evidence tends to run counter to the type of showing that is required under Section 332(c)(3)(A)(ii). For example, Arizona appended to its Petition testimony offered by an employee of the state's largest landline exchange service provider to the effect that "there is little evidence that cellular service is actually replacing traditional wireline service. . . ."[190] Moreover, the ACC concedes that, to the extent areas of the state currently lack landline telephone exchange service, this is due to the "extreme and prohibitive costs involved in extending cable facilities."[191] Under such circumstances, it is reasonable to conclude that the question whether CMRS rates in such areas are just, reasonable and not unreasonably discriminatory should be measured against the cost of extending facilities to such areas. The ACC has failed to provide any evidence in this regard. Against this background, we conclude that the ACC has failed to demonstrate circumstances that might warrant granting its petition under Section 332(c)(3)(A)(ii).

68. Arizona also fails to demonstrate that market conditions are unreasonable in the two RSAs in that state where only one cellular licensee apparently provides regular (non-

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[189] *See* Conference Report at 493: "[T]he Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service."

[190] *See* Arizona Petition at App. 5 (testimony of D. Mason, US West Communications, Inc.).

[191] *Id.* at 20.

roaming) service. Essentially, Arizona is arguing that conditions in single-provider markets are unreasonable *per se*. We do not agree. The bare fact that a market is served by a single entity does not necessarily say very much about conditions in that market when, as here, competitive entry not only is feasible but appears to be relatively easy.[192] As Arizona concedes, the other licensee in each of the two RSAs in question already provides roaming service there. Nothing in the record suggests that those licensees would confront significant barriers to entering the market to provide regular (non-roaming) service. Thus, at least in theory, it is readily conceivable that only one licensee in these RSAs offers regular service because the other licensee believes it could not offer such service profitably.

B. Entry Regulation

69. Arizona currently regulates entry by requiring a cellular service applicant to obtain a Certificate of Public Convenience and Necessity prior to instituting service.[193] Arizona routinely requires cellular applicants to submit information including: (1) delineation of the initial service territory of each cellular wholesale provider; (2) notice of any subsequent changes in service area; and (3) interconnection agreements.[194] In addition, it has upon occasion imposed conditions on service provision as warranted by unique circumstances. For example, in one case the ACC required the filing of descriptions of the type of interconnection to the wireline local exchange network, and in another situation it imposed conditions to protect against cross-subsidization by the wireline service provider.[195] In its Petition, Arizona seeks to retain its authority to regulate CMRS entry as well as rates.[196] It asserts that its entry regulation has worked to benefit Arizona subscribers, for example by ensuring that customers have information about prices and service conditions before making purchase decisions.[197]

1. Comments

70. Bell Atlantic, Century, Mohave, and US West NewVector assert that the State's request to continue entry regulation is invalid because Congress has preempted the

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[192] *See* J. Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 305 (1988).

[193] Arizona Petition at 8-9.

[194] Arizona Petition at 9-12 & App. 4.

[195] *Id.* at 12-13.

[196] *See id.* at 1, 11-13, 22.

[197] *Id.* at 11.

states entirely from entry regulation.[198] BAMMC notes that Arizona still has not eliminated its certification requirement, and states that the certification requirement and the Arizona tariff review process are preventing Bell Atlantic from offering service in the AZ-2 RSA, even though this Commission authorized BAMMC to acquire the A-side license from the current licensee in that area in June 1994.[199] Mohave asserts that the state has never denied certification to an applicant that had properly obtained FCC licenses and authority.[200]

2. Discussion

71. We agree with the commenters' assertions. Section 332 of the Communications Act clearly preempts state regulation of CMRS entry:[201]

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

This Section took effect on August 10, 1994.[202] The statute specifically provides opportunities for states to submit petitions for authority to institute or retain regulation of CMRS rates.[203] It does not provide any opportunity for states to petition for authority to regulate CMRS entry. We interpret this specific opportunity for state regulation of rates, coupled with silence regarding an opportunity to retain regulatory authority over entry, as a clear preemption of continued state regulation of CMRS entry. Accordingly, Arizona's Petition, insofar as it seeks to preclude CMRS providers from entering the marketplace, is denied. Thus, regarding Bell Atlantic's assertion that Arizona is holding up BAMMC's initiation of service provision to RSA AZ-2, we note that any state entry requirements have been unauthorized as of August 10, 1993.

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[198] *See* BAMMC Opposition at 6-7; Century Cellunet Comments at 1; Mohave Comments at 10-11; US West NewVector Opposition at 11.

[199] BAMMC Opposition at 7 n.5 & 22-23.

[200] Mohave Opposition at 12.

[201] 47 U.S.C. § 332(c)(3)(A).

[202] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(c)(2)(A), 107 Stat. 312, 396 (1993).

[203] 47 U.S.C. § 332(c)(3)(A), (B).

VI. REGULATION OF OTHER TERMS AND CONDITIONS

72. Prior to OBRA, Section 332 prohibited the states from imposing "rate ... regulation" upon certain wireless telecommunications carriers.[204] This prohibition was construed broadly to preclude almost all state regulatory activity.[205] As revised by OBRA, Section 332(c)(3) now prohibits states from regulating "the rates charged" for CMRS, but it expressly reserves to them the authority to regulate the "other terms and conditions of commercial mobile services." Although there is no definition of the term "the rates charged" in the statute or its legislative history, there is legislative history regarding the "other terms and conditions" language. We believe it is sufficient to allow us to comment in a preliminary manner on what regulatory activities the ACC is entitled to continue, despite our denial of its Petition.

73. The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services. The Committee stated:[206]

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[204] The statute provided in relevant part that "[n]o state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service . . . ." 47 U.S.C. § 332(c)(3) (prior to revisions enacted by OBRA).

[205] *See, e.g.,* Telocator Network of America v. FCC (Millicom), 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission's interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in determining whether preemption provisions of that section apply to a given communications system). *See also, e.g.,* American Teltronix (Station WNHM552), 3 FCC Rcd 5347 (1988)("Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier."), *recon. denied,* 5 FCC Rcd 1955, 1956 (1990)(note omitted) ("state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute .... [A]ccompanying legislative history reveals that Congress recognized the Commission's broad discretion to dictate which land mobile systems are to be regulated as private."). The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services. Amendment of the Commission's Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 (para. 24 n.19) (1990):

> If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section 332(c)(3).

[206] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261.

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

74. Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented by the ACC Petition and related comments. Thus, we will not expound at any length on this matter. The legislative history largely speaks for itself. It is possible to extrapolate certain findings from the legislative history, however, and we do so here in the interest of minimizing future proceedings directed at this issue.

75. First, although the ACC may not prescribe, set, or fix rates in the future because it has lost authority to regulate "the rates charged" for CMRS, it does not follow that its complaint authority under state law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates.[207] In consequence, it is conceivable that matters might arise under state complaint procedures that relate to "customer billing information and practices and billing disputes and other consumer matters." We view the statutory "other terms and conditions" language as sufficiently flexible to permit the ACC to continue to conduct proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.

76. Second, under the same logic, we also conclude generally that several other aspects of a state's existing regulatory system may fall outside the statutory prohibition on rate regulation. For example, a requirement that licensees identify themselves to the public utility commission, or whatever other agency the state decides to designate, does not strike us as rate regulation, so long as nothing more than standard informational filings is involved. Moreover, nothing in OBRA indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders. Put another way, we believe Arizona retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state. We expect that, to the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of Arizona regulatory practice at issue.

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[207] *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person "complaining of *anything done or omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208(a) (emphasis added).

VII. ORDERING CLAUSES

77. Accordingly, pursuant to Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), IT IS ORDERED that the Petition of the Arizona Corporation Commission To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services IS DENIED for the reasons set forth above.

78. IT IS FURTHER ORDERED, that the Petition for Reconsideration of the Second Report and Order in the proceeding captioned Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994), filed by the Pennsylvania Public Utility Commission, IS GRANTED to the extent set forth above.

79. IT IS FURTHER ORDERED, pursuant to Sections 1.4(b), 1.4(b)(2), and 1.106(f) of the Commission's Rules, that any petition for reconsideration of this order SHALL BE FILED within thirty days of the day after the day on which public notice of this action is given.[208]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[208] Although we assigned the ACC Petition a docket number for administrative convenience, this is an adjudicatory-type proceeding, not a rulemaking.

APPENDIX A

PR Docket No. 94-104 (Arizona)

Parties Filing Comments or Replies

American Mobile Telecommunications Association (AMTA)
AMSC Subsidiary Corporation (AMSC)
Bell Atlantic Metro Mobile Companies (BAMMC)
Cellular Telecommunications Industry Association (CTIA)
Century Cellunet, Inc. (Century or CCI)
E.F. Johnson Co. (E.F. Johnson)
GTE Services Corp. (GTE)
Mobile Telecom. Technologies Corp. (MTel)
Mohave Cellular Ltd. Partnership (Mohave)
National Cellular Resellers Assn. (NCRA)
Nextel Communications, Inc. (Nextel)
PageMart, Inc. (PageMart)
Paging Network, Inc. (PageNet)
Personal Communications Industry Assn. (PCIA)
Pittencrieff Communications, Inc. (Pittencrieff)
Rural Cellular Association
US WEST New Vector (US West or US West NV)